IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

GEORGE SCOTT PATERNO,
as duly appointed representative of the
ESTATE and FAMILY of JOSEPH PATERNO, et al.

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.

Defendants.

Docket No. 2013-2082

Type of Case: Commercial

Type of Pleading: Memorandum of Law In Support of Motion To Overrule Objections By Defendant Pennsylvania State University To Notice of Intent To Issue Subpoena To Pepper Hamilton, LLP Pursuant To Rule 4009.211

Filed on Behalf of: Plaintiff George Scott Paterno as Duly Appointed Representative of the Estate and Family of Joseph Paterno

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INTRODUCTION

A year after this case was filed, the National Collegiate Athletic Association ("NCAA") — now joined by The Pennsylvania State University ("Penn State") — continues to do anything it can to prevent discovery from going forward. Penn State's objections to plaintiff's subpoena to Pepper Hamilton seeking the raw material underlying the Freeh Report is simply one of several steps these defendants have taken to slow down the discovery process. In evaluating these objections, it is important to put this dispute in context.

Even though this Court ruled in January that most of plaintiffs' claims survived the NCAA's preliminary objections, the NCAA has now filed more than 120 pages of additional briefing seeking to re-litigate issues already resolved by the Court, while claiming that no discovery should occur until after its renewed objections are addressed. It has taken the astonishing and self-serving position that "[t]o date, absolutely nothing has come out in the public domain to shake any confidence in Judge Freeh's report,"[1] while simultaneously refusing to produce discovery until a comprehensive "confidentiality order" is in place that would prevent facts from ever becoming part of the "public domain." And although it is running from the merits in court, it has continued to peddle this misleading information to the media, adding further insult to the irreparable injuries it has already caused.

[1] Reply in Support of the NCAA Defendant's Preliminary Objections to Amended Complaint at 4.

As part of this delay-and-conceal strategy, the NCAA has openly threatened Penn State with additional sanctions, including the so-called "death penalty," if Penn State does not come to heel. In the face of those threats, Penn State has supported the NCAA and taken the position that there should be no discovery from the Freeh Firm, asserting claims of attorney-client and attorney work product privileges with respect to information underlying the Freeh Report. It is not surprising that the NCAA and its allies do not want this litigation to shine a light on the NCAA's egregious misconduct, for they are the ones who ran roughshod over plaintiffs' rights when the NCAA imposed the consent decree and, without process, accused plaintiffs of being complicit in horrific crimes. But the judicial system does not allow the "accept our word" approach that the NCAA and Penn State have adopted.

The great irony of their discovery position is that both the NCAA and Penn State publicly and aggressively touted the thoroughness of the Freeh Report, parroting Mr. Freeh's boasts of millions of documents reviewed and over 430 interviews conducted, to bolster their credibility in taking the actions they did. But now that those actions have been questioned and criticized, including the fact that the Freeh Firm interviewed almost none of the key witnesses and ignored the realities of how a predator like Sandusky deceives a community, they are desperately seeking to block a review of the underpinnings of the damaging and

unfounded conclusions in the Freeh Report. As the Court recognized when it denied the NCAA's original preliminary objections, this case deserves to be litigated on its merits.

As described in more detail below, Penn State's objections to the third-party subpoena for documents are meritless and should be rejected for at least three reasons:

First, the discovery requested is plainly relevant to the claims raised in plaintiffs' amended complaint. The subpoena is to a non-party law firm, Pepper Hamilton LLP ("Pepper Hamilton"), which is the successor to the Freeh Firm that prepared the report that formed the basis for the NCAA-imposed consent decree. Seeking documents from the Freeh Firm's successor is a reasonable method of discovery aimed at uncovering the truth regarding the NCAA's unlawful conduct, the conspiracy it entered with the Freeh Firm (and others), and the information underlying the Freeh Report.

Second, Penn State's selective assertions of privilege should be rejected because they are not Penn State's to assert, are not recognized in Pennsylvania, do not apply, or have been waived by the multiple, voluntary disclosures of information underlying the Freeh Report. The report was never intended to be confidential and was publicly released at the same time it was delivered to the Penn State Board of Trustees in July 2012. The Freeh Report says that Penn State

waived the attorney-client privilege, and the NCAA cited the waiver of privilege in its Consent Decree. Penn State did nothing when the NCAA, for its own advantage, publicized the report's unsubstantiated findings, even though the NCAA knew or should have known that the report was, at best, an incomplete rush to judgment. Moreover, the information gathered to produce the report is historical information collected from non-clients of the Freeh Firm. Neither the report nor the information on which it relies is protected under the attorney-client or attorney work product privileges.

Third, Penn State has urged the Court to prevent service of *any* subpoena before ruling on defendants' preliminary objections on the theory that "the complexion of the case could change" and because, from its cavalier perspective, the litigation is not urgent. Resp. at 20. But there is no lawful basis for that request, and urgency has defined this case — both when the NCAA rushed to judgment without offering plaintiffs any due process whatsoever, and every day the unlawful Consent Decree remains in effect and the NCAA's egregious actions stand unaddressed. In any event, no showing of urgency is required for a plaintiff to take reasonable discovery. Nor is Penn State's request procedurally proper. The Court has not restricted the parties' right to proceed with discovery and no party has affirmatively moved for such an order.

Accordingly, for the reasons set forth more fully herein, the Estate respectfully requests that the Court overrule Penn State's objections and enter an order authorizing it to proceed with service of the Pepper Hamilton subpoena.

ARGUMENT

I. Penn State's Objections To Plaintiff's Service of Discovery Requests Are Meritless.

Penn State's objections to the Pepper Hamilton subpoena are meritless. Contrary to Penn State's assertions, the document requests are relevant and appropriate in scope. Penn State has not come close to carrying its burden to show that any of the requested documents are privileged and protected from disclosure.

A. The Document Requests Are Relevant and Appropriate in Scope.

The subpoena to be served on Pepper Hamilton calls for the production of documents and information related to the Freeh Firm's investigation and the conclusions of the Freeh Report. According to Penn State, the requests seek information that is neither relevant to any issue in the litigation nor likely to lead to discoverable information. *See* Resp. at 17-18. That is wrong. The requests in the subpoena easily meet the broad standard for discovery set forth in Pa. R.C.P. No. 4003.1 ("any matter, not privileged, which is relevant to the subject matter involved"). They are reasonably tailored requests for information about the Freeh Firm's investigation, the contents of the Freeh Report, and contacts between the Freeh Firm and others (including the NCAA and the Big Ten), which are directly

relevant to numerous allegations in plaintiffs' amended complaint. *See, e.g.*, Am. Compl. ¶¶ 54-55, 58-66, 70-74, 79-81. Although Penn State cites several requests that it considers objectionable, *see* Resp. at 7-8, it has not cited a single specific request that it contends fails to meet the relevance discovery standard under the Pennsylvania Rules.

The time period covered by the requests is also appropriate. The subpoena's instructions specify that the requests call for production of documents and information from January 1, 2011 to the present. In Penn State's view, because the NCAA adopted the Freeh Report and imposed sanctions on Penn State on July 23, 2012, any documents created from that date forward are irrelevant to any of the plaintiffs' claims. But that position reflects an unreasonably cramped view of when there could be relevant documents or information. For example, an Amended Consent Decree was adopted after that date, and the defendants therefore continued to document and evaluate the matters in the Consent Decree well after that date. *See* Amendment to the July 23, 2012 Binding Consent Decree Imposed by the National Collegiate Athletic Association ("Amended Consent Decree"), Exh. 1. Directing Pepper Hamilton to use a date range of slightly more than three years (January 1, 2011 to the present) in responding to the subpoena provides a reasonably limited period, and Penn State has asserted no valid reason why responsive documents and information within that period should not be produced.

Moreover, this objection makes no sense. If the work of the Freeh Firm stopped on July 23, 2003, there will not be responsive documents after that date; if there are responsive documents, they were the result of ongoing work and should be produced.

B. Penn State's Selective Privilege Assertions Should Be Rejected

Penn State also objects that the subpoena requests privileged information. But Penn State has not carried its burden to show that any documents covered by the subpoena were ever privileged. And, in any event, Penn State has waived any possible privilege that it claims would have attached.

1. Penn State Has Not Carried Its Burden To Show That Any Documents Are Privileged

The Freeh Report's preamble states that the Freeh Firm analyzed more than 3.5 million pieces of data and documents, and conducted over 430 interviews of University personnel and other knowledgeable individuals. Although the report asserts that information was "gathered under the applicable attorney-client privilege and attorney work product doctrine," Report at 9, Exh. 2, the same report states on the next page that it "sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege by the Board." *Id.* at 10. In any event, those privileges do not apply simply because information is gathered by a law firm conducting an investigation. Nor do they attach simply because a document or party says they do.

The attorney-client privilege extends only to confidential communications between a client and his or her attorney in connection with providing legal services or advice. 42 Pa. C.S.A. § 5928;[2] *see also Nationwide Mutual Ins. Co. v. Fleming*, 924 A.2d 1259, 1264 (Pa. Super. Ct. 2007). The party asserting the privilege has the initial burden to prove that it is properly invoked. *Joyner v. Se. Pa. Transp. Auth.*, 736 A.2d 35, 38 n.3 (Pa. Commw. Ct. 1999). Moreover, the privilege protects only disclosure of communications, not the disclosure of underlying facts. *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.* 227 F.R.D. 382, 392 (W.D. Pa. 2005).

Accordingly, to support an objection based on attorney-client privilege, Penn State has the burden of showing that the documents and information that it objects to Pepper Hamilton producing satisfy the requirements of § 5928. Penn State has not come close to satisfying that burden. Instead, it asserts in sweeping fashion and with only narrow exceptions that the requests to Pepper Hamilton in the proposed subpoena "*all seek*, to some extent, the production of documents that are protected from discovery" by virtue of the attorney-client privilege and the work product doctrine. Resp. at 8 (emphasis added); *see also* Penn State's Objections to Subpoena Pursuant to Rule 4009.21, Nos. 1, 4, 17, 18, 20, 21, 23 (conceding that

[2] That section states that "[i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa. C.S.A. § 5928.

communications between the Freeh Firm and certain third parties are not privileged). In essence, with limited exceptions, Penn State objects on grounds of privilege to Pepper Hamilton producing *any* documents or information called for by the subpoena.

Penn State asserts that "[a]n attorney-client relationship plainly existed between Penn State and the Freeh Firm." Resp. at 10. But it fails to address key language in the engagement letter, which identifies those clients and thereby limits those covered by the privilege:

> Engagement Limited to Identified Client. This will also confirm that . . . our engagement is solely related to the Task Force established by the Pennsylvania State University Board of Trustees and the specific matter described above. By entering into this engagement, we do not represent any individuals or entities not named as clients herein, nor do we represent any owner, officer, director, founder, manager general or limited partner, employee, member, shareholder or other constituent of any entity named as a client in this letter[.]

Engagement Letter at 6, Exh. 3.

In any event, Penn State has not attempted to show that the Freeh Report or the documents responsive to the Pepper Hamilton subpoena meet the § 5928 standard. It simply asserts that "the vast amount of information the Freeh Firm gathered, created, and considered in the course of its investigation . . . *is not public*," Resp. at 9 (emphasis added). But "not public" is not the same as privileged, and Penn State falls far short of meeting § 5928's standard. Much of

the information responsive to the subpoena plainly does not fall within § 5928's ambit.

For example, the Freeh Report cites as "the most important documents in t[he] investigation — emails among former President Graham B. Spanier, former Senior Vice President-Finance and Business Gary Schultz, and [former] Athletic Director Timothy M. Curley from 1998 and 2001 — relating to Sandusky's crime." Report at 11, Exh. 2. Those emails were sent a decade or more before the Freeh Firm was ever hired and, as described, were not communications with counsel for the purpose of securing legal advice. There is no basis for Penn State to assert attorney-client privilege with respect to those documents or any other documents that predate the Freeh Firm's engagement in November 2011.

Rather, in its exceptions to seven requests, Penn State does not object to production of documents that constitute the actual communications described, but does object to requests for documents that "evidence, reflect, or relate" to these same communications. That position makes no sense. Penn State does not explain or demonstrate how the attorney-client privilege is properly invoked with respect to documents that "evidence, reflect, or relate" communications that are not themselves privileged. Similarly, there is no basis for Penn State to assert privilege with respect to all interviews conducted by the Freeh Firm. The interviews were conducted of more than 430 purportedly knowledgeable individuals. Report at 12,

Exh. 2. Other than communications between the Freeh Firm and its "Identified Client," Penn State has not even attempted to meet its burden of demonstrating how communications with others, including third party witnesses or interviewees, are even arguably privileged.

2. Penn State Has Waived Any Potential Privilege

Even if any documents or information assembled as part of the Freeh investigation were once arguably privileged, Penn State has waived the privilege with respect to the subject matter of the Freeh investigation and report by making *multiple*, voluntary disclosures for its own advantage, and by squarely relying on that report and its basis as a principal defense in this litigation.

First, the Freeh Report itself notes that it sets forth its findings pursuant to the appropriate waiver of the attorney-client privilege by the Board. *Id.* at 10. And the Freeh Firm shared information about the investigation with non-clients. S*ee* Dec. 8, 2011 letter from James E. Delany to Mark Emmert (referring to "an agreeable process of collaboration on *gathering and sharing information*" with the Big Ten), Exh. 4 (emphasis added); Dec. 12, 2011 letter from Cynthia Baldwin to Mark Emmert (acknowledging that the NCAA would be able to "continue to monitor these investigations" as they were ongoing, and "will have access to the report of the Special Investigative Task Force."), Exh. 5. Mr. Freeh confirmed at his press conference: "We've been in regular contact with [the NCAA and the Big

Ten] since the investigation began." Louis Freeh, *Press Conference on the Freeh Report on Pennsylvania State University* (Jul. 12, 2012), Exh. 6. The NCAA and the Big Ten were not clients of the Freeh firm.

Second, Penn State authorized the Freeh firm to make disclosures of "any discovered evidence of criminality to the appropriate law enforcement authorities," Engagement Letter, Exh. 3 at 2, without any prior consultation with Penn State, and it is clear that such disclosures were made. For example, the Freeh Firm immediately provided the above-referenced Spanier-Schultz-Curley emails from 1998 and 2001 to law enforcement. Report at 11, Exh. 2.

Penn State now attempts to re-characterize the Freeh Firm's authority as limited to disclosing criminal conduct related to the activities of "particular individuals," but not the actions of Penn State, and therefore not a waiver of Penn State's privilege. Resp. at 12-13. This effort to avoid the legal consequences of its authorization to the Freeh Firm in the Engagement Letter is striking because the word "individual" nowhere appears in the relevant provisions, nor is there any language limiting the authorization to non-Penn State personnel. On the contrary, the Engagement Letter provides that "[i]t is also understood by FSS [the Freeh Firm], the Trustees and the Task Force that during the course of FSS's independent investigation performed hereunder, FSS will immediately report *any discovered evidence* of criminality to the appropriate law enforcement authorities[.]" Exh. 3 at

2 (emphasis added). This laudable goal was not limited; it was designed to ensure that all relevant information would be communicated, as well it should be.

Third, in the "intense environment" referred to in its response, and to placate the NCAA and others, Penn State sought to highlight the independence of its investigation and review of allegations of child abuse on the University campus, and any limitation on the authorization on what the Freeh Firm could share would have hobbled that purpose. Resp. at 3. "The Special Investigative Counsel's mandate was made clear in the public statement of Trustee Kenneth C. Frazier announcing this investigation. 'No one is above scrutiny,' Frazier said. . . . Frazier assured the Special Investigative Counsel that the investigation would be expected to operate with complete independence and would be empowered to investigate University staff, senior administrators, and the Board of Trustees." Report at 11, Exh. 2.

At his July 12, 2012 press conference announcing the release of the report, Mr. Freeh emphasized that there had been no such limitation on the scope of the investigation: "In performing this work, we adhered faithfully to our original mandate: to investigate this matter fully, fairly, completely without fear or favor. We have shown no favoritism toward any of the parties, including the Board of Trustees itself, our client." Clearly, Penn State did not limit the Freeh Firm's

authority to make disclosures related to some vague, and previously unidentified category of "particular individuals" as it now argues.

Penn State erroneously contends that to show there has been a waiver of the attorney-client privilege, the Estate must show that third party disclosures were made for tactical advantage in litigation. Resp. at 12. While even that standard is clearly met here with Penn State's admitted concern about foreseeable litigation, Penn State mischaracterizers the disclosure of confidential information for a tactical advantage as *necessary*, rather than sufficient, for waiver of the privilege. It also incorrectly considers the public disclosure of the report itself as the basis of the waiver, which does not accurately reflect plaintiff's position that the waiver of any attorney-client privilege resulted from the multiple, voluntary disclosures made by the Freeh Firm with Penn State's knowledge and consent.

In addition to the public disclosure of the report, Penn State authorized other disclosures — to the NCAA, to the Big Ten, and to law enforcement — all for Penn State's tactical advantage. Penn State denies that the publication of the Freeh Report was made to achieve a tactical advantage in litigation, but it undermines its own position by also asserting that "the work of the Freeh Firm was plainly done in anticipation of litigation." Resp. at 16. And of course, the NCAA, Penn State, and other defendants plainly and repeatedly have put at issue in this very litigation the Freeh Report and its basis to justify the egregious actions taken against plaintiffs.

They have repeatedly and self-servingly pointed to the comprehensive nature of the report to justify their actions, but now aggressively seek to block any review of the report's factual basis.

Although Penn State tries to have it both ways depending on which privilege it tries to assert, it was clearly aware of and authorized disclosures of information developed as part of the Freeh investigation in an effort to gain advantages, with respect to the regulatory bodies that govern Penn State athletics (the NCAA and the Big Ten), with respect to law enforcement investigating child sexual abuse on its campus, and with respect to public opinion. Press Release, *Penn State, Frazier Provides Update on Independent Investigation* (Jan. 20, 2012), Exh. 7. It also sought to align itself with the Pennsylvania Attorney General by authorizing the Freeh Firm to disclose any evidence of criminal wrongdoing after two high-ranking University officials had been indicted. Report at 11, Exh. 2. Penn State clearly foresaw litigation on the horizon when it structured its engagement with the Freeh Firm to allow disclosures to third parties, and the consequence of that tactical decision is waiver of any privilege in this action.

Courts in Pennsylvania have recognized that selective sharing of otherwise confidential information developed in the context of an investigation will result in a subject matter waiver. *See Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425-27 (3d Cir. 1991) (rejecting claim of selective

waiver and ordering Westinghouse to produce to adversary in civil litigation the summary of internal investigation as well as underlying documents that had been disclosed to the government because attorney-client privilege was waived as to the subject of the investigation); *Adhesive Specialists, Inc. v. Concept Scis. Inc.*, 59 Pa. D. & C.4th 244, 263 (C.C.P. 2002) ("[D]elivery of an internal memorandum to the Pennsylvania State Police constituted voluntary disclosure to a third party" and "a waiver of the attorney-client privilege, even if the state police agreed not to disclose the communication to anyone else."); *Miniatronics Corp. v. Buchanan Ingersoll, P.C.* 23 Pa D.&C.4th 1, 18-21 (C.C.P. 1995) (voluntary disclosure of confidential information to gain tactical advantage sufficient to waive attorney-client privilege for all communications involving same subject matter); *accord Murray v Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (voluntary disclosure of communication protected by attorney-client privilege may result in waiver of privilege for all communications pertaining to the same subject). As the court stated in *Nationwide Mutual Insurance Company v. Fleming*, *supra*, a case relied on by Penn State, "[a] litigant attempting to use attorney-client privilege as an offensive weapon by selective disclosure of favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse." 924 A.2d at 1259.

Courts from other jurisdictions outside Pennsylvania have also rejected the concept of limited waiver that Penn State advances in the unique circumstances of this case. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002) ("The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality as to others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." (internal quotation marks omitted)); *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) ("Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option."); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (rejecting selective waiver because "[a]nyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage"); *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179,1185 (10th Cir. 2006) (noting that disclosure to third party usually waives privilege); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (holding that waiver or privilege as to one party serves to waive as to others); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371-74 (D.C. Cir. 1984) (holding that disclosure to the government waives attorney-client privilege and extending the waiver to the work-product doctrine); *SEC v. Roberts*,

254 F.R.D. 371, 378-80 (N.D. Cal. 2008) (ordering a law firm to disclose all documents, factual information, and attorney notes previously made available to the SEC in an SEC action against the former vice president of the client for whom the firm conducted the investigation); *Ryan v. Gifford*, No. 2213-CC, 2008 Del. Ch. LEXIS 2, *21-24 (Del. Ch. Jan. 2, 2008) (ordering the production of all documents produced in the course of an internal investigation when some of those documents were previously disclosed to third parties including NASDAQ and the SEC).

Penn State contends that the report was made public as the result of a "limited waiver" of the attorney-client privilege. Resp. at 4. But this affirmative use of the Freeh Report, and the defendants' repeated invocation of the Freeh Firm's investigation to justify their actions against defendants, have directly put the Freeh Firm's work and communications at issue in this litigation. Penn State, by now asserting the privilege as a defense to resist discovery into the Freeh investigation, runs afoul of an inviolate principle of privilege law – Penn State simply cannot be permitted to use privilege as both a sword and shield. *Nationwide*, 924 A.2d at 1262-63.

Nor is Penn State entitled to assert a "limited waiver" for its disclosure to law enforcement or others. Its multiple, voluntary disclosure of documents and information developed as part of the Freeh investigation resulted in a waiver of any

privilege protection for documents or information related to the Freeh investigation or report. To the extent there are any communications responsive to the Pepper Hamilton subpoena that might otherwise be privileged, Penn State has waived that privilege.

II. Penn State's Assertion of Pepper Hamilton's Objections Are Improper and Meritless

A. Penn State Cannot Assert The Work Product Privilege for Pepper Hamilton

Penn State objects to issuance of the Pepper Hamilton subpoena on grounds that it calls for production of materials protected by attorney work product doctrine. Unlike the attorney-client privilege, which belongs to the client to assert, the work product doctrine is asserted by the attorney. *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 866 (3d Cir. 1994) (work product protection belongs to the professional rather than the client). Penn State is not the appropriate party to assert the work product protection for the professionals at Pepper Hamilton, and such an objection is not a proper basis on which to prohibit service of the subpoena.

Rule 4003.3 provides that "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or theories." Contrary to Penn State's assertion that requests for documents or information that support statements

in the Freeh Report expressly call for protected work product (Requests Nos. 5-10, 12-14), factual information is not work product. *Sandvik Intellectual Property, AB v. Kennametal, Inc.*, No. 10-cv-654, 2011 U. S. Dist. LEXIS 11104, at *8 (W.D. Pa. Feb. 4, 2011) ("Information that is merely factual may not be withheld under the umbrella of work product."). This definition also does not necessarily include communications between the Freeh Firm and third parties regarding the investigation.

As part of its work product objection, Penn State contends that the Freeh investigation was conducted and the report prepared when Penn State was confronting litigation from Sandusky's victims, the Department of Education, and potentially the State of Pennsylvania. It does not, however, contend that the Freeh Report was prepared in anticipation of litigation by the plaintiffs in this lawsuit. In Pennsylvania, the work product protection is not available unless the requests are made in connection with the litigation for which the material was prepared. *Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C.5th 242, 249 (C.C.P. 2007) (the "protections [recognized under Pennsylvania law] apply only to the litigation of the claims for which the impressions, conclusions, and opinions were made"). Therefore, the work product protection would not constitute a basis for Pepper Hamilton (let alone Penn State) to resist discovery in this case.

Moreover, the work product doctrine is not absolute. It is a qualified protection and may give way where it concerns highly relevant evidence, particularly where the requesting party needs the requested material. *Lane v. Hartford Acci. & Indem. Co.*, 1990 Pa. Dist. & Cnty. Dec. LEXIS 328, 14-15 (Pa. C.P. 1990). Here, the extensive scope of the investigation was cited as support for the authoritative nature of the Freeh Report. Report at 9-12, Exh. 2. The Estate could not reasonably duplicate that effort in trying to determine the basis for statements in the report. Thus, for documents or information responsive to the subpoena that constitute work product, the protection should give way to the Estate's substantial need for the requested information.

Finally, to the extent the Freeh Firm shared its conclusions or impressions with others, such as the NCAA, the Big Ten, or law enforcement, it has waived the protection that might otherwise apply. *See United States v. Nobles*, 422 U.S. 225, 239-41 (1975); *Westinghouse*, 951 F.2d at 1421 (work product protection waived by selective disclosure); *Adhesive Specialists*, 59 Pa. D. & C.4th at 263 (work product protection waived). Whether any protection remains for any of the potentially responsive materials remains to be seen; what we know now is that there certainly is not blanket protection.

B. Penn State's Other Objections on Behalf of Pepper Hamilton Are Meritless

Penn State asserts several other objections that properly belong to Pepper Hamilton. None has merit.

Penn State purports to assert the "self-examination privilege," which is not even recognized in Pennsylvania. Penn State contends that the holding of *Van Hine v. Department of State*, 856 A.2d 204, 212 (Pa. Commw. Ct. 2004) (per curiam), leaves room to breathe life into such a privilege for the first time. But the court in *Van Hine* observed that no Pennsylvania court, other than federal cases, has even discussed the privilege. *Id.* at 212 n.7. The court did not suggest that it would recognize that privilege (and, in fact, noted that evidentiary privileges are not favored in Pennsylvania) but concluded that even if it were recognized, that hypothetical privilege would not have resulted in greater protection of the file at issue than under the recognized privileges it had already considered. There is no reason to adopt such a new privilege in this case, which was not recognized in *Van Hine* nor in any case in the intervening ten years since *Van Hine* was decided.

And in a position that stands in sharp contrast to its claims of privilege, work product, and confidentiality, Penn State also argues that Pepper Hamilton should not be put to the burden of searching for and producing documents that are "readily available . . . in the public domain." Resp. at 19. It is not a valid objection to a properly issued subpoena that the information can be obtained elsewhere. *Eigen v.*

Textron Lycoming Reciprocating Engine Div., 874 A.2d 1179, 1189-90 (Pa. Super. Ct. 2005). Penn State does not describe even generally what those documents are or the requests to which they would be responsive. Nor does Penn State explain how it would simplify matters for Pepper Hamilton to have to identify all such documents in responding to a subpoena.

Penn State objects to the burden and cost compliance with the subpoena would impose on Pepper Hamilton, although Pepper Hamilton is entitled to reimbursement of such costs under the terms of the Engagement Letter. To the extent Penn State is ultimately responsible for Pepper Hamilton's costs, that is due to the terms it agreed to with the Freeh Firm, and not attributable to plaintiffs. But cost alone is not a reason for barring proper discovery. And unlike other discovery disputes that might involve assessment of costs to collect responsive information, here the responsive materials have already been collected and reviewed as part of the Freeh investigation. Report at 9, Exh. 2. Put another way, Penn State has already paid the Freeh Firm to review and analyze 3.5 million records and conduct over 430 interviews, a fact cited by defendants repeatedly in public and in this litigation to bolster the Freeh Report's credibility and the NCAA's actions. The cost complained of by Penn State has largely been incurred and a database of documents is readily accessible and available for production. Resp. at 5 n.1. This cost argument is a red herring and not a valid basis to deny discovery here.

III. Penn State's Objections Do Not Justify Barring Service of the Subpoena

In addition to its improper assertions of privilege and objections on behalf of Pepper Hamilton, Penn State raises various other arguments for barring service of the subpoena. These objections should also be overruled.

A. Penn State's Statutory Objections Are Unsupported

Penn State contends that it provided documents to the Freeh Firm that have no bearing on Sandusky's conduct or the University's response thereto, and which "very well may" (Resp. at 18) be protected by a state or federal privacy statute: the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), or the Criminal History Record Information Act, 18 Pa. C.S.A. § 9102 ("CHRIA"). Penn State asserts that it is "entitled and required to see that no documents are produced," but acknowledges that it does not know whether Pepper Hamilton even has such protected documents or information, and offers no reason why documents covered by these statutes would have been produced to the Freeh Firm if, as asserted, they have no bearing on the subjects of the investigation. Nor does Penn State suggest how such privacy statutes would apply to any of the categories of documents or information called for by the subpoena. Accordingly, even if Penn State believes it has some obligation under these statutes, its inability to account for the presence of such protected documents dooms this objection.

B. Penn State's Belated Confidentiality Concerns Cannot Delay Discovery

Penn State asks the Court to prevent service of the subpoena until after a global protective order is entered, and observes that the Motion did not refer to the draft protective order that had been circulated for review. Resp. at 22. In fact, the NCAA first circulated a proposed protective order only two days before the Motion was filed. Since that time, counsel have exchanged comments on the proposal, but no agreement on terms has been reached largely because the parties fundamentally disagree about what can fairly be designated "confidential" and by whom.

No one disputes that there is a zone of non-public information relating to Sandusky's victims that can and should remain confidential. But defendants are seeking to protect information that goes far beyond anything relating to Sandusky's victims and instead appears to have been proposed only to further delay discovery and to prevent the truth concerning the NCAA's conduct from coming to light. As a result, plaintiffs do not agree with the proposed vague standard that would allow defendants to designate as "confidential" "commercial, sensitive, proprietary, personal or financial for which the designating party believes in good faith that special protection from public disclosure is warranted." Nor do plaintiffs agree that a party can reasonably designate as "confidential" information produced by another source because that information, by definition, is not confidential

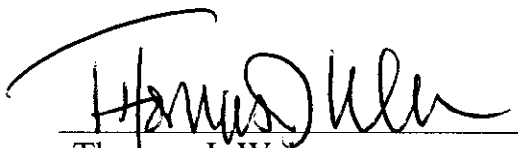
information. Indeed, the sensational facts giving rise to the claims in this case have been widely disseminated and discussed in the press, and there is no reason defendants should be permitted to hide as "confidential" information concerning their egregious misconduct.

It is ironic that defendants, who cared so little about plaintiffs' interests when the NCAA imposed the consent decree, now propose such a low threshold of confidentiality when information is requested from them. Furthermore, neither the NCAA nor Penn State has moved for entry of a protective order, and they should not be rewarded for attempting to delay proceedings. The lack of an agreed upon protective order should not preclude service of the subpoena.

CONCLUSION

For the foregoing reasons, the Estate respectfully requests that the Court grants this motion and overrules Penn State's objections to service of the subpoena to Pepper Hamilton.

Dated this ____day of May, 2014.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO OVERRULE OBJECTIONS BY DEFENDANT PENN STATE UNIVERSITY TO NOTICE OF INTENT TO ISSUE SUBPOENA TO PEPPER HAMILTON LLP PURSUANT TO RULE 4009.21** was served this 9th day of May, 2014 by first class mail and email to the following:

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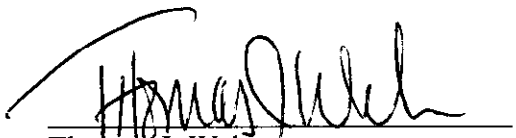

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